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DOCTOR APPOINTED BY COURT—TO INVESTIGATE AND EXAMINE INTO MENTAL CONDITION OF CRIMINAL DEFENDANT—TESTIFIED AS EXPERT ON MENTAL CONDITION OF DEFENDANT AT TRIAL OR OTHER HEARING—DOCTOR ENTITLED TO RECEIVE STATUTORY FEE UNLESS TESTIMONY GIVEN AS PART OF PHYSICIAN'S DUTIES—LIMA STATE HOSPITAL—SECTION 2945.40 RC—SEE OPINION FOR CITATIONS, OPINIONS ATTORNEYS GENERAL.

SYLLABUS:

When a doctor employed by the State of Ohio at the Lima State Hospital has been appointed by a court, pursuant to the provisions of Section 2945.40, Revised Code, to investigate and examine into the mental condition of a criminal defendant, and has testified as an expert on the mental condition of said defendant at a trial or other hearing, said doctor is entitled to receive the fee provided by said section unless the testimony was given as a part of said doctor's official duties at the Lima State Hospital. (Opinion No. 555, Opinions of the Attorney General for 1923, Vol. I, page 436; Opinion No. 3750, Opinions of the Attorney General for 1934, Vol. III, page 1900; and Opinion No. 3854, Opinions of the Attorney General for 1941, page 438, approved and followed. Opinion No. 5548, Opinions of the Attorney General for 1942, page 734, overruled. Opinion No. 1193, Opinions of the Attorney General for 1915, Vol. III, page 2477; Opinion No. 1599, Opinions of the Attorney General for 1916, Vol. I, page 872; and Opinion No. 723, Opinions of the Attorney General for 1949, page 393, discussed.)

Columbus, Ohio, August 30, 1955

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "On June 7, 1950 the Grand Jury of Cuyahoga County returned a first degree murder indictment against one A. The defendant interposed a plea of not guilty. On September 21, 1950 the defendant, being found to be then legally insane, was committed to the Lima State Hospital. In January 1955 he was found to be restored to reason and was returned here for trial. On February 23, 1955 the defendant interposed a plea of not guilty by reason of insanity at the time the act was committed. As a result of this plea and upon the specific request of the attorneys for the defendant, psychiatrists were appointed by the court, who testified in the case as provided for in section 2945.40 of the Revised Code.
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> "One of the psychiatrists so appointed was Dr. B., Superintendent of the Lima State Hospital for the Criminally Insane. Dr. B. rendered a bill to the Common Pleas Court for this expert testimony in this case, and the amount thereof was certified by the trial judge to our Board of County Commissioners for payment. The question now arises as to whether the fact that Dr. B. is the Superintendent of the Lima State Hospital would prohibit the payment of his bill by the Board of County Commissioners.
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> "Enclosed herewith are copies of Dr. B.'s bill and affidavit and the trial court's letter transmitting the bill to the Board of County Commissioners."

The question of the payment of witness fees—both ordinary and expert fees—to public officers and employees has been the subject of numerous opinions by my predecessors in the last forty years. Those opinions have not been wholly consistent with one another, nor are they all consistent with the principles which I believe govern the question which you have presented. Although you have presented only the question of expert fees, it is impossible to discuss the problem intelligently and to establish certain basic principles without analyzing all of the previous opinions, including those dealing with ordinary, as distinguished from expert, witness fees.

The basic statutes have remained practically unchanged over the period in question. Section 2335.08, Revised Code, formerly Section 3014, General Code, provides as follows:

> "Each witness attending, under recognizance or subpoena issued by order of the prosecuting attorney or defendant, before the grand jury or any court of record, in criminal causes, shall be allowed the same fees as provided by section 2335.06 of the Revised Code in civil causes, to be taxed in only one cause when such witness is attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, such fees shall be paid from the county treasury, and, except as to the grand jury, taxed in the bill of costs. Each witness attending before a justice of the peace, police judge, magistrate, or mayor, under subpoena in criminal cases, shall be allowed the fees provided by such section for witnesses in the court of common pleas. In state cases such fees shall be paid out of the county treasury, and in ordinance cases they shall be paid out of the treasury of the municipal corporation, upon the certificate of the judge or magistrate, and they shall be taxed in the bill of costs.
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> "When the fees enumerated by this section have been collected from the judgment debtor, they shall be paid to the public treasury from which such fees were advanced."

Section 2335.06, Revised Code, Section 3012, General Code, sets the monetary amounts of fees and mileage as follows:

> "Each witness in civil cases shall receive the following fees:
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> "(A) Three dollars for each day's attendance at a court of record, or before a justice of the peace, mayor, or person authorized to take depositions, to be taxed in the bill of costs. Each witness shall also receive five cents for each mile necessarily traveled to and from his place of residence to the place of giving his testimony to be taxed in the bill of costs; on demand a witness shall be paid one dollar by the party at whose instance he is subpoenaed before being required to answer said subpoena which shall be considered a part of any fees to which said witness is entitled;
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> "(B) For attending a coroner's inquest, the same fees and mileage provided by division (A) of this section, payable from the county treasury on the certificate of the coroner."

Expert witness fees are dealt with by Section 307.52, Revised Code, Section 2494, General Code, as follows:

> "Upon the certificate of the prosecuting attorney or his assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the board of county commissioners may allow and pay the expert such compensation as it deems just and proper and as the court approves."

In considering the previous opinions of this office it would be helpful to keep in mind that the payment of witness fees to public employees does not present a single question, but rather presents a series of questions. Broken down, those questions may be stated as follows:

1. Can the public employee lawfully demand witness fees and mileage, and can the appropriate treasurer lawfully pay such fees and mileage to him.

2. Can the public employee lawfully receive his regular salary and travel allowances during the time he is away from his duties testifying in court.

3. Can the public employee retain the fees and mileage for his own use, or must he return them to his regular employer.

4. Can the public employee be paid as an expert for testifying as to special knowledge which he has acquired; and can he receive such a fee when he has acquired the special knowledge as a part of his official duties.

These distinctions have not always been borne clearly in mind by the persons who have propounded questions nor by the attorneys general who have purported to answer them. They should be kept separate in considering the following discussion.

The first opinion in the series under discussion is Opinion No. 1143, Opinions of the Attorney General for 1915, Vol. III, page 2477. The syllabus of the opinion is somewhat enigmatic and has led to some confusion in the later opinions, and it is therefore more profitable to consider the reasoning of the opinion. The question there presented involved assistant state fire marshals who had investigated arson cases as part of their official duties and who had then been called to testify in the counties in which the trials were held. The state fire marshal who presented the question had considered such testimony as part of his assistants' official duties, and had paid them their regular salaries and travel allowances

during the time involved. He asked the then Attorney General whether the men were also entitled to receive witness fees and mileage from the counties in which they testified.

Inherent in this factual statement were most of the questions which I have set out above, and the author of the opinion considered each question presented. He first approved the payment of the regular salaries and travel allowances when the men were appearing as witnesses, pointing out that such testimony was as much a part of their official duties as was the investigation of fires, and in fact was an official duty required of them. He then pointed out that while the statutes of the state did not prevent such men from receiving witness fees, "they cannot serve the state in an official capacity and be permitted at the same time to receive compensation from other sources for the same official service."

The author then considered the reverse situation in which a witness testified in matters not required of him by the duties of his office, and held that in such a case witness fees properly could be received. He pointed out, however, that in such a case the witness could not be paid any official salary or expenses from the state. He concluded by holding that when "it appears that any assistant fire marshal has accepted fees and mileage as a private citizen for attendance as a witness and has also for the same time received his salary and expenses from the state, he should be required to refund to the state the salary and expenses so paid."

The same Attorney General in Opinion No. 1599, Opinions of the Attorney General for 1916, Vol. I, page 872, held as indicated by the syllabus:

> "Inspectors appointed by the state liquor licensing board are not entitled to witness fees and mileage in cases of criminal prosecution of offenses against the liquor laws, where such inspectors are at the same time receiving their salaries and expenses for their time and services as such inspectors."

In Opinion No. 555, Opinions of the Attorney General for 1923, Vol. I, page 436, the then Attorney General had before him the question of witness fees to chemists of the Department of Health. After approving the rule laid down in the two earlier opinions that state employees paid to perform their official duties could not also receive fees and mileage, he held that any mileage collected from the court should be paid to the state fund from which the witness's travel expenses had been paid. This was

a relaxation of the previous strict rule set out in the 1915 opinion, supra, that a witness who received fees and mileage must forfeit his salary and expenses for the corresponding period. Such a liberal rule is certainly more realistic and lays down what I believe to be a proper policy that any financial burden connected with the giving of testimony should be borne by the public employer, at the same time avoiding any unwarranted profit to the employee.

Opinion No. 3750, Opinions of the Attorney General for 1934, Vol. III, page 1900, approved the rule of the 1923 opinion and held that a state highway patrolman was entitled to witness fees and mileage, but was required to pay them over to the fund which had paid his salary and expenses. The opinion also emphasized that the question of whether a witness is entitled to receive fees to be taxed as part of the costs in a case, and the question of whether he can retain them for his personal use are separate and distinct—a distinction which had not been properly recognized in the 1915 opinion. There is no compelling reason why the costs against a criminal defendant should be reduced because of the circumstance that the witnesses happen to be public employees.

In 1937 the Supreme Court decided the case of State, ex rel. Shaffer, v. Cole, 132 Ohio St., 338. The case held that under a statute no longer applicable police officers were entitled to the usual witness fees in Common Pleas Court cases. The Court did not pass on the question of whether the officers might retain the fees for their personal use. The chief importance of the case has been the following statement from the opinion of Weygandt, C. J., appearing at page 339:

> "In approaching this problem it is helpful to remember the general rule that when a public officer, in the discharge of his official duties, is not required to be present in person upon the trial of a particular case, he is entitled to the same fees as any private person if he is called as a witness therein. * * *"

Subsequent opinions of this office have interpreted the word "required" to refer only to those officers such as the sheriff or the clerk of courts who are required to attend upon all sessions of the court. This was the holding of Opinion No. 3854, Opinions of the Attorney General for 1941, page 438, which also held in the third branch of the syllabus as follows:

> "In the event a county official is paid his regular salary and travel allowance during the period he is under subpoena as a wit-

> ness, any witness fees received by such official should be turned back to the county treasury from which his salary and travel allowance was paid."

The author of that opinion reviewed the previous authorities, set out the rules discussed above, and also approved the distinction recognized in the 1934 opinion, supra, between receiving fees and retaining them.

Only one year later, in Opinion No. 5548, Opinions of the Attorney General for 1942, page 734, the same Attorney General took an entirely different tack. Without mentioning any of the previous opinions discussed above, he held as indicated by the syllabus as follows:

> "1. The Superintendent of the Bureau of Criminal Identification and Investigation and the assistants and employes thereof may legally collect witness fees when subpoenaed to appear in court in a criminal case.
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> "* * * 4. Where the Superintendent of the Bureau of Criminal Identification and Investigation or an assistant or employe thereof testifies as a witness in court pursuant to subpoena, the expense incurred on account of such appearance as a witness may not be paid from funds appropriated to such bureau for traveling expense."

While this opinion has no direct bearing on the problem set out in your request, it had the effect of upsetting one of the steps in an orderly process which had been created since the time of the 1915 opinion, by affecting the right of a state employee to draw his salary and expenses while testifying in a matter within the scope of his duties. I can find no distinction between the employees of the Bureau of Criminal Identification and Investigation and the employees of the Fire Marshal, The Liquor Licensing Board, The Department of Health and the Highway Patrol, dealt with in the earlier opinions, which would justify a departure from the rule previously established; and to that extent I decline to follow the 1942 opinion.

This process of ignoring the earlier precedents and failing to distinguish the several precise questions presented by these cases was continued in Opinion No. 723, Opinions of the Attorney General for 1949, page 393. That opinion presented exactly the same question which you have presented to me—namely, the right of a doctor at the Lima State Hospital to receive a fee as an *expert* witness in an insanity case. Since

a special statute is involved it properly can be set out here. Section 2945.40, Revised Code, Section 13441-4, General Code, provides as follows:

> "In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by a court or jury, the court may commit the defendant to a local hospital for the mentally ill, or a Lima state Hospital, where the defendant shall remain under observation for such time as the court directs not exceeding one month. The court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing. In case of such appointment the court shall forthwith notify counsel of the names and addresses of the persons so appointed. The expert witnesses appointed by the court may be called by the court and shall be subject to examination and cross-examination by the prosecuting attorney and counsel for the defendant. The appointment of such expert witnesses, and their testifying as witnesses, shall not preclude the prosecuting attorney or defendant from calling other witnesses to testify on the subject of insanity. Such persons so apointed may be required by the court to prepare a written statement under oath, concerning the mental condition of the defendant, and file the same in the case. Such report shall not be read as evidence, except that it may be used by either counsel on the cross-examination of the witness who signed the same. The court shall instruct the jury in case of such appointment and testimony of such expert witnesses, that the credibility of such witnesses, in common with all other witnesses in the case, is for the exclusive consideration and determination of the jury. Persons so appointed shall be paid a reasonable fee for their examination or service and their reasonable expenses, the amount whereof shall be certified by the judge or court making the appointment and paid by the county."

The then Attorney General failed to distinguish between expert fees under this statute and the ordinary fees and mileage previously discussed, and after setting out the 1942 opinion with which I have expressed my disagreement, he arrived at several conclusions dealing with witness fees in general. I find myself unable to consider that opinion because it simply was not responsive to the question presented.

This brings us to the problem which you have presented: A., indicted for murder, was found to be presently insane, and was committed to the Lima State Hospital for confinement and observation. After five years he was returned to your county as sane and able to stand trial. He

then entered a plea of insanity at the time he committed the murder in question. Pursuant to the provisions of Section 2945.40, Revised Code, one of the doctors at the Lima State Hospital was appointed to examine into this question and to testify as an expert at the trial. Can he now be paid as an expert witness?

It will be noted that Section 2945.40, supra, provides that such persons so appointed "shall be paid a reasonable fee for their * * * service and * * * expenses, the amount whereof shall be certified by the judge * * * and paid by the county." In the present case the trial judge has approved the amount of the fee in question and has forwarded it to the Commissioners with the following notation:

> "Unquestionably this should be paid unless the fact that Dr. B. is on the state payroll prohibits."

So the court has not ordered that the bill be paid, but has specifically reserved the question of whether, as a matter of law, the fact that Dr. B. is a state employee prevents his being paid an expert's fee.

It is my opinion that the fact of state employment alone does not prevent Dr. B. from receiving a fee. So long as he is not testifying as to a matter within the scope of his official duties, he stands in the same position as any other expert witness appointed under the statute. Section 2945.40, Revised Code, provides that when the present sanity of a defendant is in question he may be referred to the Lima State Hospital for observation. In such a case I do not believe that Dr. B. would be entitled to an expert's fee for testifying as to the results of his official observation. But when he is appointed only in his capacity as a qualified physician, there is no reason why the fee should not be paid simply because he happens to be a state employee.

As I have pointed out above, the questions of the right of the doctor to demand and receive his fee, and his right to retain it for his own use are separate and distinct. I believe that a confusion of these two questions has given rise to most of the problems in this field. Undoubtedly considerations of how much of the knowledge and experience which contributed to the expert's opinion were acquired in the performance of his official duties, would influence the amount of the fee allowed and the decision of his employer as to how much of it he should retain. But those considerations are not involved in the question which you have presented.

In answer to your question it is therefore my opinion that when a doctor employed by the State of Ohio at the Lima State Hospital has been appointed by a court, pursuant to the provisions of Section 2945.40, Revised Code, to investigate and examine into the mental condition of a criminal defendant, and has testified as an expert on the mental condition of said defendant at a trial or other hearing, said doctor is entitled to receive the fee provided by said section unless the testimony was given as a part of said doctor's official duties at the Lima State Hospital. (Opinion No. 555, Opinions of the Attorney General for 1923, Vol. I, page 436; Opinion No. 3750, Opinions of the Attorney General for 1934, Vol. III, page 1900; and Opinion No. 3854, Opinions of the Attorney General for 1941, page 438, approved and followed. Opinion No. 5548, Opinions of the Attorney General for 1942, page 734, overruled. Opinion No. 1193, Opinions of the Attorney General for 1915, Vol. III, page 2477; Opinion No. 1599, Opinions of the Attorney General for 1916, Vol. I, page 872; and Opinion No. 723, Opinions of the Attorney General for 1949, page 393, discussed.)

Respectfully,

C. William O'Neill
Attorney General